AN UNSETTLED POINT OF EVIDENCE.[1]

HOW FAR CAN A WITNESS-TO-VALUE DETAIL OTHERWISE INADMISSIBLE SALES AND APPRAISALS ON WHICH HE FOUNDS HIS OPINION?

IN the trial of cases involving the value of real property, witnesses who are personally acquainted with the subject, and who are capable of forming an opinion, are allowed to give in evidence their opinion of the property's value; and are generally allowed to go even farther, and give the grounds for their opinion.

It has been customary for counsel to take advantage of this license to introduce as evidence much irrelevant matter in aid of their case, which would be unhesitatingly ruled inadmissible if offered on any other plea.

No class of witnesses is more partisan in its testimony than these witnesses-to-value, since in establishing the side of the case they are called on, they also establish the accuracy of their own opinion; and, accordingly, it is usual for such a witness, in response to the request of counsel to "state the grounds on which he bases his opinion," to drag into the case all the sales, appraisals, tax valuations, or other facts, rumors, or fancies, that he believes will be useful to prop up his opinion, or that he has been told will be useful to his side of the case.

While the inferior courts have occasionally excluded such details, they have more often admitted them, and have thus allowed the admissibility of this sort of testimony to become more or less firmly established in practice, in total opposition to the common-law theory of evidence, and with the practical result of hopelessly confusing juries, who quite naturally assume that if the evidence is good enough to found the opinion of the witness on, it is good enough to found a verdict on.

Some examples that have lately come under my notice in the Superior Court of Massachusetts will serve to illustrate the point.

In one case the presiding judge ruled that a witness-to-value, in

[1] Since the above article was sent to us for publication, the point under discussion has been settled in Massachusetts in accordance with the view advocated by the article. See Hunt *v.* Boston, 152 Mass. 168. — EDS.

giving the grounds on which his opinion rested, could not give the details of sales of property, not sufficiently similar to the property in question, to be otherwise admissible in evidence. In another case another judge ruled just the other way, and allowed the witness to state all the details of such sales, even though he had no personal knowledge of the terms of some of them. In a case before county commissioners a witness was permitted to give the details of the appraisals of sundry pieces of property made by appraisers appointed by the Probate Court, and the valuations placed on sundry pieces of property by assessors.

The reasons generally urged for the admissibility of such details are that it is an "established rule of evidence that the witness may give the grounds for his opinions," or that "an expert may always give the details on which he founds his opinions." Both of which reasons are fallacious; since a rule of evidence can not be said to be established until it is declared to be law by the highest tribunals, however much it may be imbedded in the practice of the lower courts; and no court of final resort has decided that such details are admissible so far as I have been able to ascertain; while in one jurisdiction such evidence has been adjudged inadmissible.[1]

Again, witnesses-to-value are not allowed to testify to their opinions because they are experts, and have science or skill greater than the jurors, but because they have knowledge of the particular facts in the case which the jurors have not, and so by an exception to the general rule of evidence and of necessity they are not confined in their testimony to facts, but may also testify as to their opinions.[2]

While, however, there is a wide difference between an expert and a witness-to-value in the difference of the qualifications which make them able to give this exceptional sort of evidence, it is to be observed that the evidence given by either of them is practically the same; that is to say, they are each of them allowed to testify as to their opinion, and therefore if an expert be allowed to state irrelevant facts, as the grounds and reasons upon which his opinion is founded, reasoning from analogy it might seem that a witness-to-value might do the same.

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[1] Bollman *v.* Lucas, 22 Neb. 796.

[2] Shattuck *v.* Stoneham Br. Ry., 6 Allen, p. 115, Chapman, J., p. 117; Wyman *v.* Lexington & W. Camb. Rd., 3 Met. 316, p. 327; Swan *v.* Middlesex, 101 Mass. 177, Gray, C. J.

Chief Justice Shaw,[1] in deciding that an expert may state the grounds on which he founds his opinions, defines the extent of the doctrine quite clearly, as follows: "The ground on which an expert, a person of large experience in any particular department of art, business, or science, is permitted to testify to his opinion, is, that from his larger experience and more exact observation of facts, and the connection between certain appearances, and their causes or results, he is able to draw correct conclusions from circumstances, which a man of ordinary knowledge and experience could not do. The circumstances on which such an opinion may be founded are either facts of general notoriety, assumed to be known to all persons of skill and experience in the department to which they pertain, and which, when explained, may be comprehended and applied by any person of good understanding; or it may be founded on facts proved.

"Such general facts, assumed to be generally known without specific proof, because they are capable of being known and understood, without any such proof, to all inquirers, are vastly too numerous to define; but the point may be illustrated by saying they are such as the elements and forces of physical nature, the structure, capacities, and functions of the human and other animal bodies, the common powers, propensities, and passions of human nature, and the impelling and governing motives to human action. As these are capable of being comprehended, when explained, without specific proof, it appears to the court that the witness should be permitted to explain the grounds and reasons of his opinion to the court and jury; they may readily perceive the force of his reasoning, the soundness or fallacy of his logic, and therefore judge of his capacity to give an opinion on the subject, and the correctness of his conclusions, and consequently the weight due his opinion."

It was evident that in giving this decision Chief Justice Shaw never contemplated the possibility of a witness detailing facts which it would not be legitimate for the jury to consider as a ground for their verdict, and although other cases have been less definite in their language, the principle does not seem to have been extended by the decisions.

The analogy of expert testimony would therefore seem to show just the contrary of the claim that irrelevant details may be stated

[1] Dixon *et al. v.* Fitchburg, 13 Gray, 546, at p. 555.

by a witness-to-value as reasons for his opinion, and therefore if admissible at all they must be so on some peculiarity of their own.

In the case of Sexton *v.* North Bridgewater[1] the court, citing Dickinson *v.* Fitchburg, held a witness-to-value was rightly permitted to state the reasons of his opinion, saying that "the nature of those reasons affected only the weight of this testimony." The reason alleged by the witness was that the change in the highway gave a right of way which the plaintiff did not have before. But this case cannot be quoted as an authority for the admissibility of such evidence as appraisals and the details of irrelevant sales, since it only determines that the witness may mention a fact, that the jury was entitled to consider independently of its being a reason of the witness's opinion.

Possibly the language of the decision might be construed to allow a witness to mention as a reason for his opinion any fact however irrelevant, as, for instance, that he had heard of or knew of sales and appraisals of other estates in the vicinity, which would seem to be legitimate; but when he undertakes to go further and state the details of those sales or appraisals, then the evidence becomes objectionable.[2]

In the case of Edmands *v.* Boston[3] a witness was allowed to give the details of sale, since it was *in some sense a criterion* and therefore admissible. The implication from this decision would seem to exclude irrelevant sales.

There is no evidence in determining the value of land more satisfactory, but at the same time more misleading if not carefully guarded, than the sales of other similar estates under similar circumstances and at about the same time, and accordingly, when the court has determined that there is the resemblance to make them a criterion, they are admitted in most jurisdictions as evidence of value;[4] but the use made of this expedient is to introduce to the jury sales that are misleading, and appraisals by assessors or others which the court would not allow the jury to consider as evidence of value, and which if allowed would be sufficient ground for granting a new trial.[5]

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[1] 116 Mass. 200.
[2] Bollman *v.* Lucas, 22 Neb. 796.
[3] 108 Mass. 535.
[4] Presby *v.* Old Colony Rd., 103 Mass. 1, at p. 9.
[5] Chandler *v.* Jamaica Pond Aqueduct, 122 Mass. 305; Gardner *v.* Brookline, 127 Mass. 358, at p. 362.

The assumption that the witness may go on and give details because he may state as the ground of his opinion the fact that there were such sales is not justified by the usual rules of evidence, where the fact of an occurrence or existence of a thing being relevant is admitted in evidence, but the details of the occurrence or thing being irrelevant are excluded. As for instance the fact of a conversation[1] having taken place, or a letter having been received, may be admissible,[2] while what was said in the conversation or the contents of the letter may be inadmissible.

It would seem reasonable that the party cross-examining a witness should be allowed to elicit all the details of any sales mentioned by the witness as a reason in the examination-in-chief, but even cross-examination should stop there, and should not go so far as to inquire of the witness whether he had considered other irrelevant sales in making up his mind, and then proceed to elicit the details of those sales, as is often done on the double plea that "it is cross-examination" and "the witness says he considered these sales in making up his mind."

But such inquiry does not fall within the legitimate scope of cross-examination, as the law is very aptly stated by Mr. Justice Knowlton in giving the decision of the court in Sullivan *v.* O'Leary.[3] "The discretion exercised in regard to cross-examination should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on trial, and which is, at the same time, of such a character as to be likely to be applied to them by the jury, and improperly affect the verdict."

In addition to the objection that irrelevant details, for whatever purpose introduced, would scarcely fail to be considered more or less for every purpose, there is the further objection that such details, even though elicited on cross-examination, are objectionable, since they injuriously multiply the issues to be tried; for each of these sales or appraisals is subject to explanation,[4] and all the circumstances surrounding them may be proved. And therefore on this ground alone, since they are immaterial to the direct issue,

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[1] McBride *v.* Cicotte, 4 Mich. 478; Pierce *v.* Gibson, 9 Vt. 216.

[2] Mayo *v.* Mayo, 119 Mass. 290.

[3] 146 Mass. 322. See also Thompson *v.* Boston, 148 Mass. 387; Crowell *v.* Porter, 106 Mass. 80.

[4] Ham *v.* Salem, 100 Mass. 350.

the court should not allow them to be brought into the case, to hopelessly confuse and lengthen the trial.[1]

In any aspect of the case it would be sound law and reason to confine an expert or witness-to-value in giving the grounds of his opinion to the details of such transactions as are otherwise relevant to the issue.

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[1] Lincoln *v.* Taunton Copper Company, 9 Allen, 181; Crowell *v.* Porter, 106 Mass. 80.